89-910

No.

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1989

ALICE CHATHAS and BYRON ELLIS,
Petitioners,

v.

NORBERT SMITH, Individually and as Chief of Police of Village of Evergreen Park, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Is a lawyer deprived of her right to be free from unreasonable seizure and excessive force when, after she has been fully scanned for weapons upon entry to the courthouse to try a case (and found to be unarmed), two deputy sheriffs physically lift her up and drag or carry her over twenty feet into a darkened jury room, shut the door so a third deputy can frisk her, search her purse, and physically bar her from leaving?

2. Is a civil litigant deprived of his right to be free from excessive force and access to the courts when, upon entry to the courthouse on the day his civil trial is to begin, police officers grab, tackle, punch and pound him, maneuver him into a jury room, stand armed in the doorway to prevent him from leaving, and then cause him to be delivered to a mental hospital to have him committed when commitment under the circumstances would knowingly have violated state law?

3. Is a lawyer defending a village in a civil suit entitled to qualified immunity when he knowingly orchestrates an illegal involuntary admission of the plaintiff in that suit to a mental hospital so that he can deprive that plaintiff of his day in court?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Alice Chathas and Byron Ellis respectfully petition this Court for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to remand this cause to the United States District Court for the Northern District of Illinois for a new trial.

[1] A complete list of the respondents is as follows: Norbert Smith, Thomas Evoy, Carl Bergman, Kenneth Klomhaus, Vincent Ruffalo, James Ross, Carmen DiCarlo, Angeline Chmielewski and Vincent Cainkar.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming the district court's entry of a directed verdict for the defendants, by a two-to-one vote, is set forth in the Appendix (*infra,* pp. A - 1 through A - 21). Said opinion is reported at 884 F.2d 980 (7th Cir. 1989).

JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit was entered on September 5, 1989. No petition for rehearing was filed. Petitioners invoke this court's jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment IV

Searches and seizures

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment XIV

§ 1. Citizenship rights not to be abridged by states

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 United States Code § 1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof, to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

STATEMENT OF THE CASE[2]

Petitioners brought this action for deprivation of their civil rights pursuant to 42 U.S.C § 1983. The district court had jurisdiction under 28 U.S.C. § 1343. On May 5, 1987, the district court entered an order directing verdicts for all defendants after plaintiffs presented their case-in-chief. Plaintiffs filed a motion for new trial on May 18, 1987; it was denied on October 9, 1987. Notice of appeal was filed on November 9, 1987. The United States Court of Appeals for the Seventh Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. On September 5, 1989, the seventh circuit, by a two-to-one vote, affirmed the district court's order.

History of the Underlying Litigation

Petitioner, Byron Ellis, had been employed as a police officer for the Village of Evergreen Park, Illinois, for ten years, when he learned that his employer had neglected to enroll him in the Illinois Municipal Retirement Fund. He retained petitioner, Alice Chathas, to represent him in an attempt to regain his retirement benefits. In November, 1979, he filed suit against the Board of Trustees of the Village of Evergreen Park, the secretary of the police department pension fund and the clerk of the Village, who was also the local agent for the fund. The village retained

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[2] In reviewing the district court's granting of directed verdicts to all defendants, the court of appeals, as the district court, was obliged to view the evidence and draw all inferences in the light most favorable to the petitioners herein. See e.g. *Bergren v. City of Milwaukee*, 811 F.2d 1139, 1142-43 (7th Cir. 1987).

respondent, Vincent Cainkar, a private attorney, to represent it in the pension litigation.

In the course of the litigation, Chathas received harassing telephone calls, had her brake line cut and had a brick thrown through her garage window. Ellis found that someone removed a storm window from his home and attempted to remove the inner window. Ellis became increasingly more worried. He sought psychiatric advice. His psychiatrist recommended that he remain off work, on disability leave, until his pension case was resolved. Ellis heeded the advice.

In October of 1980, a judge of the Circuit Court of Cook County reinstated Ellis to the retirement fund. The case was then transferred to the Worth Township Courthouse, in Alsip, Illinois, and set for trial at 1:00 p.m. on March 30, 1981, to determine when Ellis became eligible for the benefits. The defendants requested that Ellis be examined by a psychiatrist before trial. On March 19, 1981, Ellis was examined by Dr. Ramesh H. Doshi. Ellis told Doshi he was feeling depressed and having difficulty sleeping and concentrating. He told Doshi about the episodes recounted above. Finally, he told Doshi, "If I felt mistreated or if I felt cornered, I may blow somebody away."

Ellis saw Doshi a second time, on March 21, 1981. At that meeting Doshi recommended that Ellis voluntarily hospitalize himself. Ellis declined and Doshi informed him that he felt obliged to disclose his concerns to Ellis' "intended victims." Later that day Doshi telephoned the Village police department and informed respondent, Sergeant Klomhaus, of Ellis' statement. He told Klomhaus that Ellis was stable but that he had a potential for violence; Doshi did not think the danger was immediate, but that March 30th could be a critical point because of the court date.

Klomhaus wrote a memorandum of the conversation to respondent Smith, the Chief of Police. Smith received it on Monday, March 23rd, and that day contacted Cainkar for guidance.

On March 27th, Cainkar called Smith back and told him that he had spoken with the presiding judge at the Worth

Township Courthouse (Judge Eiserman). The judge arranged for additional security at the courthouse for the 30th. Cainkar called Smith again that day and instructed him to have Doshi fill out a certificate for Ellis's involuntary admission to a psychiatric hospital. On March 28th, Klomhaus brought the certificate to Doshi. Doshi signed it but indicated that he had last seen Ellis on March 19th. Respondent Evoy delivered the certificate to Cainkar's house.[3]

The Arrest

On March 30th, pursuant to the presiding judge's order, respondent, deputy sheriff James Ross, arrived at the courthouse at 9:00 a.m., with a metal scanner. He met with respondent, Vincent Ruffalo, and told him to lock all the doors but one and set up a desk in the rotunda, by the door. He explained that they were there because of a potential problem with Ellis and that they were to observe the trial and report back to the judge.

Shortly thereafter, Cainkar arrived. He informed Ross that the police would be arriving soon to take Ellis to the local mental health center for an involuntary admission for evaluation. Respondents Smith, Evoy and Bergman arrived next. After speaking with Cainkar they stood off to the side so they would not be seen.

Cainkar went to see the judge who was scheduled to hear the pension case (Judge Salerno). He asked the judge to sign commitment papers. The judge refused.

At 11:40 a.m., Chathas and Ellis arrived at the courthouse, ready for trial. They approached the desk and respondent, deputy sheriff Carmen DiCarlo, told Chathas to stop. She did. Two deputy sheriffs scanned her with a metal detector, going over her front, side and back. Then they scanned her purse. Despite Chathas' twice asking why they were doing this, she got no response.

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[3] Illinois law directs that a psychiatrist certifying that a person is in need of involuntary evaluation, must have seen the patient 72 hours prior to admission (Ill. Rev. Stat. Ch. 95 ½, §3-602). Doshi had seen Ellis eleven days before.

Chathas told them that she had to proceed to courtroom 2. DiCarlo stopped her. He and another deputy then took her arms and physically lifted her off the ground, against her will, carried or dragged her over twenty feet across the rotunda, deposited her in a darkened jury room and shut the door. Another deputy sheriff, respondent, Angeline Chmielewski, was waiting there. Chmielewski took Chathas' purse and searched it thoroughly. Then she patted Chathas down. Throughout, Chathas asked why this was happening, but Chmielewski only laughed and said, "I'm going to search."

After Chathas was removed from the rotunda, Ellis was scanned and his briefcase searched. Afterwards Ellis attempted to proceed to courtroom 2. Smith and Evoy called out to him. Ellis kept going and Smith, Evoy and Bergman took off after him. Others joined them. The police all wore guns. Evoy and Bergman grabbed Ellis and started to push and jostle him. Ellis asked whether he was under arrest. No one in the group responded. They told him he had to go with them. Ellis kept heading for the courtroom.

Ross said, "Don't let him in the courtroom." Then he tackled Ellis around the waist and pulled him back. Someone else was pounding Ellis on his lower back and kidney area. Ellis was maneuvered across the rotunda and deposited in the jury room where Chathas was being held.

Chathas told Smith to release her client. Smith told her, "Go F___ yourself." She told Cainkar they were there to conduct a trial and Cainkar said, "I'm not doing any jury trial today. He's going * * * * to Tinley Park [Mental Health Center]." Chathas sought to leave the room but neither Evoy nor Ross would let her pass. Ultimately, Chathas did leave the jury room and went to the library. She picked up a copy of the Illinois Mental Health Code and returned to the jury room with it, telling Cainkar that the requirements of the statute were not being met. Cainkar replied, "I don't care if it is or it isn't." Chathas told him he was violating Ellis' civil rights. To this Cainkar replied, "So what. I don't care. He's going." Finally, Chathas again told him he was breaking the law. And Cainkar replied, "I don't give a damn about the law. He's going. Take him away."

Cainkar told someone not to let Chathas or Ellis out of the room. Smith directed his officers not to let Ellis go. Evoy and Bergman guarded Ellis. Eventually, a police officer from Alsip and two paramedics from the Alsip fire department entered the room. One of the paramedics reported that when he arrived at the courthouse he was stopped by the deputy sheriffs. He saw a lot of policemen and a lot of guns. He was advised that they had "an emotionally disturbed patient" . . . who was "known to be armed and could possibly be dangerous."

The paramedic entered the jury room and observed "a tense atmosphere." There was "a lot of yelling, a lot of hollering." No one identified the patient so he approached the person who appeared to him to be the most upset. He went directly to Chief of Police, Smith. Smith redirected him to Ellis. The paramedic convinced Ellis to accompany him to the hospital.

The Release

Upon arrival at the hospital, the mental health technician on duty asked the paramedics if they had "any paperwork" for Ellis' admission. They had none. Then police officers Klomhaus and Bergman arrived on the scene and presented the facially invalid certificate signed by Doshi. The technician asked the police oficers if they could sign a petition for involuntary admission based on their personal observation of Ellis. Klomhaus responded by reporting an incident of December, 1978, close to three years earlier. At that time Klomhaus had been called to the Ellis home by Ellis' former wife; she had called in and reported that Ellis was in a "highly nervous state and that he had been "sitting on the couch in the living room with his silver gun by his side." After Mrs. Ellis' phone call, Ellis had gone to the basement. Mrs. Ellis was afraid that her husband was suicidal. When Klomhaus spoke to Ellis from the head of the stairs, Ellis told him that if he "or anyone came down and set a foot on the stairs he would blow [him] away."

Klomhaus was not able to report any more recent observation. Nor was Bergman. The technician then spoke privately with Chathas and Ellis to determine if Ellis was in need of hospitalization. Finding no cause to detain Ellis, he released him.

REASONS FOR GRANTING THE WRIT

I.

A LAWYER HAS BEEN DEPRIVED OF HER CONSTITUTIONAL RIGHT AGAINST UNREASONABLE SEIZURE AND EXCESSIVE FORCE. THE SEVENTH CIRCUIT IS PLAINLY WRONG IN HOLDING THAT RESPONDENTS COMMITTED NO CONSTITUTIONAL VIOLATIONS IN LIFTING THE LAWYER UP OFF HER FEET, AGAINST HER WILL, CARRYING OR DRAGGING HER ACROSS THE COURTHOUSE, DEPOSITING HER IN A DARKENED JURY ROOM AND SHUTTING THE DOOR SO SHE COULD BE FRISKED, SEARCHED AND RESTRAINED UNDER ARMED POLICE GUARD.

A majority of the seventh circuit held that under the facts presented Chathas was not deprived of her constitutional right against unreasonable seizure and excessive force. To support its conclusion the court very blithely asserted that as a matter of law, in 1981, "the appropriate standard for excessive force claims was unsettled." (A.-18) Using this strange premise as its building block the majority reasoned that respondents did not act unreasonably, that the force exerted was not excessive, and that because petitioners did not sustain serious injury respondents were immune from liability for this conduct because they enjoyed qualified immunity.[4]

Furthermore, the majority of the seventh circuit in this case went on to hold that even under the objective reasonableness standard, now used to analyze excessive force claims, Chathas "did not prove or offer evidence" that the respondents' actions

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[4] Under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), a two-part analysis exists to determine qualified immunity: (1) Does the alleged conduct set out a constitutional violation? and (2) Were the constitutional standards clearly established at the time in question? See also, *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Wade v. Hegner*, 804 F.2d 67 (7th Cir. 1986); *Lojuk v. Johnson*, 770 F.2d 619 (7th Cir. 1985).

were unreasonable because she never testified that she was willing to proceed voluntarily. (A.-19)

We agree "that not every push and shove would form the basis for a Fourth Amendment claim." (A.-19) However, it stretches the outer limits of dignity to characterize what happened here as a push or shove! What was heaped upon Chathas would have sufficed to raise a constitutional issue if the petitioner had been a shopper in a supermarket. But she was a lawyer — an officer of the court — accosted in a courthouse which she entered to represent a client.

Given the background in which the drama was played, the seventh circuit's analysis is strained beyond credulity. The majority treats it as if it were a case of an adolescent prank gone awry. It is not, as the majority suggests, a garden variety "excessive force" case arising out of a street arrest. To the contrary, Chathas, a lawyer, had every right to enter the courthouse with her client — and every right to enter a courtroom therein to engage in a civil trial. The Fourth Amendment provides her this guarantee: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." It has long since been recognized, in countless decisions of this court, that "The basic purpose of this Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara v. Municipal Court,* 387 U.S. 583 (1967). Yet reading the majority opinion of the court below, Chathas was not entitled to this basic constitutional protection.

Even assuming there was legitimate reason to scan Chathas with a metal detector upon her entry into the courthouse, there is no conceivable legitimate explanation for deputies lifting her off the floor against her will and carrying or dragging her over twenty feet across the rotunda into a dark jury room so that she could be patted down by another deputy.[5] Everyone should have known it was wrong. The fact that the seventh circuit hadn't

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[5] No one else entering the courthouse was subjected to such a pat down — not even Ellis, the supposedly dangerous person.

yet handed down *Gumz v. Morrissette*, 772 F.2d 1395 (7th Cir. 1985) or *Lester v. City of Chicago*, 830 F.2d 706 (7th Cir. 1987) doesn't change it. As was aptly stated by Judge Pell, in *Foster v. Zeeko*, 540 F.2d 1310 (7th Cir. 1974):

> The law does not expect police officers to be sophisticated, constitutional or criminal lawyers, but because they are charged with the responsibility of enforcing the law, it is not unreasonable to expect them to have some knowledge of it [citing Glasson v. City of Louisville, 518 F.2d 899, 910 (6th Cir. 1975), cert. denied, 423 U.S. 930, 96 S.Ct. 280, 46 L. Ed. 2d 258 (1976)].

Nor does the fact that there was no case law on point negate Chathas' firmly established constitutional right to be free from unreasonable seizure and excessive force. Chathas' right springs from the constitution, not from case law. By the seventh circuit's analysis, no one could establish a constitutional violation absent a prior construction of the provision, involving similar facts.

Certainly this is wrong.

A jury should have been allowed to determine whether respondents, in furtherance of a conspiracy to deprive Ellis of his right to present his pension case, used excessive force on Chathas so that they could effectuate their plan.[6]

Further, the court of appeals' majority pronouncement, that Chathas offered no evidence that she was willing to go with the deputies voluntarily, is under the circumstances of this case, hard to swallow. Chathas testified she was carried *against her will;* and that despite her requests for information no one would tell her where or why she was being taken. Was this not enough?

We submit, it was.

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[6] There is no question that Chathas was seized. As this court recently stated, in *Brower v. County of Inyo*, 489 U.S. ___, 103 L.Ed.2d 628, 634, 109 S.Ct. ___, quoting *Tennessee v. Garner*, 471 U.S. 1, 7 (1985) "Whenever an officer restrains the freedom of a person to walk away he has seized that person."

II.

A LITIGANT WAS DEPRIVED OF HIS RIGHT TO BE FREE FROM EXCESSIVE FORCE AND ACCESS TO THE COURTS, WHEN AFTER HE WAS SCANNED FOR WEAPONS AND HAD HIS BRIEFCASE SEARCHED UPON ENTRY TO THE COURTHOUSE ON THE DAY HIS TRIAL WAS TO BEGIN, RESPONDENTS GRABBED, TACKLED, PUNCHED AND POUNDED HIM — KNOWING HE WAS UNARMED — TO MANEUVER HIM INTO A JURY ROOM — WHERE HE WAS FORCIBLY HELD — UNTIL HE WAS ILLEGALLY REMOVED TO A MENTAL HEALTH FACILITY FOR AN INVOLUNTARY ADMISSION. PROBABLE CAUSE WAS LACKING.

Ellis' right of access to the court, to settle his dispute, is a hallmark of our society. One of our most sacred rights:

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship. . .granted and protected by the federal constitution.

Chambers v. Baltimore & Ohio R.R.Co., 207 U.S. 142, 148 (1907); see also, *Jackson v. Procunier*, 789 F.2d 307, 310 (5th Cir. 1986).

Moreover, the right of access to the courts does not, we submit, rest on denial of "ultimate access" or a showing of prejudice. (A.-16) On the lower court's logic, if a person acting under color of law, through stratagems, prevented another from securing his rights in a court of law for years — a victim who persevered and ultimately gained access, would have no constitutional claim.

Here, the seventh circuit conceded that under Illinois law, respondents did not have the legal authority to have Ellis involuntarily admitted to a psychiatric facility for an evaluation. The court recognized that *two* judges of the Circuit Court of Cook

County had refused to sign commitment papers for Ellis and "[t]here was some evidence that Ellis could be safely confined within the courthouse." How could this be anything but a "deprivation of any rights privileges, or immunities secured by the Constitution and law." It is not disputed, nor does the court below point to any evidence, that anyone had observed Ellis engage in any behavior that rendered him a danger to himself or others for several years, let alone within the required time frame for involuntary admission set by the state mental health code. Yet the court of appeals went out of its way to weigh the evidence and find that the respondents had probable cause to ambush Ellis and have him forcibly removed from the courthouse and taken to the Tinley Park Mental Health Center. This ruling denigrates our judicial system and creates a stark injustice. Probable cause should have been determined by the jury, not by the district court or the court of appeals.

"Probable cause is a 'fluid concept' — turning on the assessment of probabilities in particular factual contexts." *Illinois v. Gates*, 462 U.S. 213, 232 (1983). The existence of probable cause is a question for the jury in a damage suit "if there is room for a difference of opinion." *Llaguno v. Mingey*, 763 F.2d 1560, 1565 (7th Cir. 1985) (en banc) *cert. dismissed* 478 U.S. 1044 (1986); *Gramenos v. Jewel Companies, Inc.*, 797 F.2d 432 (7th Cir. 1986).

There was room for a difference of opinion here. The police in this case did not find themselves in a situation at all like the one in *McKinney v. George* (726 F.2d 1183 (7th Cir. 1984)), upon which the seventh circuit relied. In *McKinney*, the evidence was uncontroverted that on the night of the arrest in question a defendant police officer personally observed the plaintiff to be running naked through the halls of the police station. 726 F.2d at 1188. Also in that case, the plaintiff did not merely exhibit a "potential" for violence; he was actually brandishing knives and otherwise threatening others in the hallway of his apartment building. The other tenants were afraid to go out of their doors.

How does this compare to the situation here, where: (1) Ellis made a potentially threatening comment to a psychiatrist in the confines of the psychiatrist's office; (2) the psychiatrist — who never suggested involuntary admission for Ellis, let alone initiate the same — informed the police of the comment and the police

took no overt action for nine days; (3) no respondent personally observed Ellis to be a danger to himself or others during this time frame; (4) no respondent had even heard of Ellis engaging in any questionable activity during this time period; and (5) most importantly, Ellis successfully passed through the metal scanner at the courthouse so that the respondents knew he was unarmed.

There is no comparison.

In *Bevier v. Hucal*, 806 F.2d 123, 128 (7th Cir. 1986), the seventh circuit held that the police lacked probable cause to arrest parents for child neglect where: (1) there was an absence of evidence that neglect was knowing or wilful; (2) the police failed to investigate the situation; and (3) the police ignored the opinion of an experienced investigator from the Illinois Department of Children and Family Services that the matter did not rise to a violation of the child neglect statute. In that case, Judge Cummings stated:

> A police officer may not close her or his eyes to facts that would help clarify the circumstances of an arrest. Reasonable avenues of investigation must be pursued especially when, as here, it is unclear whether [an involuntary admission is appropriate].
>
> * * * *
>
> Although the police must be allowed some margin of error, a police officer evaluating a situation for probable cause must utilize the means at hand to minimize the risk of error. See 1 LaFave, Search and Seizure [3.2, at 467.

These words could have been written for the case at bar. Yet the seventh circuit conveniently forgot them.

Petitioners submit the respondents conspired to close their eyes to the facts at hand and effectuate the arrest of Ellis. They clearly failed to "utilize the means [available to them] to minimize the risk of error." The question of their good faith belief in the reasonableness of their conduct was for the jury.

Also, there is no support in the law for the holding by that *as a matter of law*, Ellis' potentially threatening statement to

Doshi *eleven* days earlier formed a sufficient basis for the respondents to have conspired to arrest Ellis and cause him to be taken to a mental hospital for observation, especially where there was not a scintilla of evidence that Ellis did or said anything in the interim to reflect an abnormal mental state. The Illinois Mental Health Code does not countenance any such basis for a person's confinement.

The respondent police officers, as well as Cainkar, must be charged with knowledge that under the law they had no probable cause to arrest Ellis and have him carted off to a mental institution. Doshi's certificate was stale and the presiding judge's order providing additional security at the courthouse was appropriately designed to deal with any potential problem that Ellis could present. Any uncertainty surrounding this issue should have been resolved once it was determined that Ellis was unarmed.

Moreover, the deputy sheriffs had to have known they were far exceeding their authority when they assisted in this shanghai. The deputy sheriffs, according to Ross, had been directed to scan all courthouse entrants, observe the trial and report back to the judge — not beat Ellis and hold him under guard.

In still other words, the standard of immunity is whether officers of reasonable competence could disagree on whether the arrest was reasonable. *Malley v. Briggs*, 475 U.S. 335 (1986). In this case, a question of fact existed as to whether the respondents were under a duty to make further inquiries as to Ellis' allegedly dangerous propensities or take alternative measures to protect themselves from him. It cannot be deemed coincidental, or ignored, as the district court and the court of appeals did, that the courthouse from which Ellis was abducted was the forum set for trial of his pension suit, or that some of his abductors were the defendants in that case. And the proffered suggestion that the assemblage of so many peace officers was coincidental is but an affront.

III.

A CONFLICT AMONG THE CIRCUITS EXISTS AS TO WHETHER A PRIVATE LAWYER, DEFENDING A VILLAGE IN A CIVIL SUIT, IS ENTITLED TO IMMUNITY WHEN HE WRONGLY ORCHESTRATES AN INVOLUNTARY ARREST OF THE PLAINTIFF IN A COURTHOUSE AND HAS HIM CARTED OFF TO A MENTAL HOSPITAL ON THE DAY PLAINTIFF'S CASE WAS SET FOR TRIAL.

With a quick stroke of the pen, the court of appeals skirted another issue of utmost importance — whether a private attorney, defending a municipality in a civil suit, is entitled to immunity for his wrongful conduct. "The village hired Vincent Cainkar; a private attorney in civil practice to represent it in the pension case." (A.-3) This was stipulated. The record leaves no question about the overzealousness with which he undertook the defense of that suit. He sought the advice of two judges on the legality of having Ellis committed. Failing that, he masterminded the coup in question. Yet the court of appeals stated:

> Because the only allegation against Cainkar was that he conspired with the other defendants to violate the plaintiffs' constitutional rights and because the other defendants cannot be found liable, Cainkar also cannot be liable. Although the district court held that Cainkar was entitled to absolute immunity, we need not decide this issue because Cainkar, like the other defendants, either did not violate anybody's constitutional rights or was qualifiedly immune.

(A.-19) Cainkar had everything to do with it. He carried the baton. In relegating Cainkar's part in this travesty to triviality, the court of appeals also further muddies an issue that confounds the circuits; an issue that has never been resolved

by this court — that is to say, whether a private party, acting under color of state law, is entitled to any immunity.[7]

The question of availability of qualified immunity for private persons acting under color of state law was expressly left open by this court in *Lugar v. Edmunson Oil Co.*, 457 U.S. 922 (1982).[8] Since that time the United States Courts of Appeal for the Sixth and Ninth Circuits have ruled that there is no such immunity. *Duncan v. Peck*, 844 F.2d 1261 (6th Cir. 1988); *Howerton v. Gabica*, 708 F.2d 380, 385 n.10 (9th Cir. 1983). The Eighth Circuit has held to the contrary. *Buller v. Buechler*, 706 F.2d 844 (8th Cir. 1983). So has the Fifth Circuit, the Tenth Circuit and the Eleventh Circuit. *Folsom Investment Co. vs. Moore*, 681 F.2d 1032, 1037-38 (5th Cir. Unit A 1982); *DeVargas v. Mason*, 844 F.2d 714 (10th Cir. 1988); *Jones v. Preutt & Mauldin*, 851 F.2d 1321 (1987). The district court for the district of Delaware has also allowed for such immunity. *Shipley v. First Federal Savings and Loan*, 703 F.Supp. 1122 (D. Del. 1988). This court should, in this case, resolve the conflict and provide the lower courts with guidance. And, we submit, hold there is *no* immunity.

But even if this court were to hold that private individuals could be protected by immunity — either absolute (district court) or qualified (seventh circuit) — there is no basis for any immunity to be accorded Cainkar under the circumstances here. Far from showing that Cainkar had a reasonable good faith belief that the course of conduct he had undertaken was proper under state law, the evidence showed that he had a blatant disregard for the law and Ellis' rights — and implicit in his remarks and conduct was that he knew he was violating the constitution and the laws. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Davis v. Scherer*, 468 U.S. 183, 194n 12 (1984).

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[7] The court of appeals, in footnote 4 to its opinion, noted it did not have to reach the question. However, this seems to be somewhat at odds with its oblique holding, which we quote above, that "Cainkar . . . was qualifiedly immune."

[8] Prior to *Lugar*, the First Circuit had held that private actors acting under state law were not entitled to immunity. *Downs v. Sawtelle*, 574 F.2d 1 (1st Cir. 1978)

Even if Cainkar had held a reasonable belief that Ellis posed a danger to his clients, that belief should have vanished following the searches. Ellis was found to be unarmed and the presence of the extra contingent of Cook County deputy sheriffs at the courthouse should have allayed any reasonable person's fears of potential violence. Continuation of even a lawful arrest violates the Fourth Amendment when additional facts are learned which dissipate earlier probable cause. *Bevier v. Hucal*, 806 F.2d 123 (7th Cir. 1986). Cainkar should have allowed the trial to proceed as scheduled rather than abort it through a farcical hijack.

Finally, even if it could be said that the police may not have known they were violating the law, the same cannot be said for Cainker. Cainker was a lawyer. He had consulted judges on the question even before March 30th. On the day in question, the trial judge refused to sign an order for the commitment after the arrest of Ellis. Chathas, when she was allowed to leave the jury room, returned with the Illinois Mental Health Code and told Cainkar what it read:

> A peace officer may take a person into custody and transport him to a mental health facility when, as a result of his personal observation, the peace officer has reasonable grounds to believe that the person is subject to involuntary admission and in need of immediate hospitalization to protect such person or others from physical harm. . . Upon arrival at the facility, the peace officer shall complete the petition under section 3-601.

(Ill. Rev. Stat. Ch. 95½, § 3-606)

Cainkar was not a "*peace officer*"; notwithstanding, he conducted himself as one. Moreover, section 3-602 directs:

> The petition ***shall be accompanied by a certificate*** executed by a physician . . . which states that the respondent is subject to involuntary admission and requires immediate hospitalization. ***The certificate shall indicate that the physician . . . personally examined the respondent not more than 72 hours prior to admission . . .*** (Emphasis supplied.)

At the risk of some redundancy, Cainkar appreciated that he needed a certificate to accompany the petition. He attempted to obtain one. He telephoned Chief Smith on March 27th and requested that he have Dr. Doshi fill out such a certificate. And he arranged to have the certificate delivered to his home the following day. The certificate showed, however, that Dr. Doshi had examined Ellis on March 19th, a full eleven days before the arrest.

Thus, Cainkar clearly knew that he was acting illegally when he set up the arrest of the petitioners and the transport of Ellis to a mental hospital.

CONCLUSION

The opinion in this case is a step backward in the construction of the Fourth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. If permitted to stand, it will provide precedent that will deprive these plaintiffs as well as others of basic constitutional rights. It should be reversed.

Wherefore, for all of the foregoing reasons, petitioners Alice Chathas and Byron Ellis pray that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit, directing it to remand this cause to the United States District Court for the Northern District of Illinois for a new trial.

Respectfully submitted,

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 87-2821

ALICE CHATHAS and BYRON ELLIS,

Plaintiffs-Appellants,

v.

NORBERT SMITH, Individually and as
Chief of Police of Village of Evergreen Park, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 81 C 3908—Paul E. Plunkett, *Judge*.

ARGUED APRIL 13, 1988—DECIDED SEPTEMBER 5, 1989

Before MANION and KANNE, *Circuit Judges*, and FAIRCHILD, *Senior Circuit Judge*.

MANION, *Circuit Judge*. Plaintiff-appellant Byron Ellis, a former police officer with the Village of Evergreen Park, assisted by his lawyer, plaintiff-appellant Alice Chathas, sued the Village and various responsible officials to secure increased pension benefits. On the day the trial was supposed to begin, the various defendants—deputy sheriffs, Village officers, and the lawyer representing the Village—attempted to involuntarily commit Ellis to a mental institution. The mental hospital found that Ellis did not meet its admission standards. Later he won the pension

benefits he originally sought. Ellis and Chathas subsequently sued the various defendants under 42 U.S.C. §1983 to redress alleged deprivations of their rights under the Fourth and Fourteenth Amendments.

After plaintiffs presented their evidence to a jury, the district court granted defendants' motion for a directed verdict. Plaintiffs appealed. Because we agree with the district court that the plaintiffs did not present evidence sufficient to show any deprivation of any constitutional right, we affirm.

I. NATURE OF THE CASE[1]

In 1968, plaintiff-appellant Byron Ellis joined the Village of Evergreen Park Police Department (Police Department) in Evergreen, Illinois, as a police officer. For ten years, Ellis performed his duties quietly. In 1978, however, Ellis accidentally shot his niece at his home. On December 11, 1978, Sergeant Klomhaus of the Police Department received a call from the former Mrs. Ellis that—in the words of the sergeant's contemporaneous internal report—her husband was in a "highly nervous state," as evidenced by the fact that he "had been sitting on the couch in the living room with his silver gun by his side." Mrs. Ellis stated she feared that her husband would kill himself. By the time Klomhaus and two other officers arrived at his house, Ellis had gone to the basement. According to his memorandum, Klomhaus "spoke to Detective Ellis from the head of the stairs and received the reply that if we or anyone came down and set a foot on the stairs he would blow us away."

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[1] In evaluating a motion for a directed verdict this court must, as must a trial court, view the evidence and make all inferences in the light most favorable to the nonmoving party. If reasonable jurors could differ as to the conclusions to be drawn from the evidence, the jury must hear the case. *See, e.g., Bergren v. City of Milwaukee*, 811 F.2d 1139, 1141-42 (7th Cir. 1987).

Less than a year later, Ellis learned that—contrary to what he had assumed—the Police Department had not enrolled him in the Illinois Municipal Retirement Fund (the Fund). To assist him in becoming enrolled, Ellis retained plaintiff-appellant Alice Chathas to represent him. In November, 1979, Ellis sued, in Illinois state court, the Fund, a local agent for the Fund, the Board of Trustees of the Village of Evergreen Park, and Carl Bergman, who was an Evergreen police officer and the Fund's secretary. The Village hired Vincent Cainkar, a private attorney in civil practice, to represent it in the pension case. The parties have stipulated in the pretrial order in this action that "Cainkar was an attorney for the Village of Evergreen Park."

Ultimately, the pension case was set for a hearing on pending pretrial motions and for possible trial on Monday, March 30, 1981. Circuit Court Judge Joseph Salerno would preside in the Worth Township Courthouse in Alsip, Illinois. By this time, Ellis was no longer working and had already been declared eligible for disability and pension benefits from the Fund (thus narrowing the issues for trial to when he became eligible for those benefits). On March 12, 1980, while on duty, Ellis had admitted himself to a hospital emergency room for tests. Ellis stated to hospital personnel that he was working without any disability benefits and felt increasingly worried. The hospital referred Ellis to Dr. Sokhey, a psychiatrist. Dr. Sokhey recommended that Ellis remain off work until the pension case was resolved. Ellis saw Dr. Sokhey for more than four months. Ellis followed Dr. Sokhey's advice and did not return to the Police Department. In response to an inquiry by Police Chief Norbert Smith, Chathas stated that Ellis was absent and undergoing treatment because he was "under significant physical and emotional strain and apprehension." Subsequently, Ellis filed a claim for worker's compensation in which he claimed anxiety, neurosis, and depression as his injuries.

To verify Ellis's claim that he was mentally disabled, the Fund had requested that Dr. Ramesh Doshi, a psychi-

atrist, examine Ellis. Dr. Doshi examined Ellis on March 19, 1981. As Doshi testified, Ellis told him that he was depressed, was not sleeping, and was experiencing distress. Ellis also told Doshi that he felt that Village officials and Police Department officers were conspiring against him because of the pension litigation. As part of this conspiracy, Ellis believed that those people were threatening his life and his attorney's life. According to Doshi, Ellis told him that "[h]is attorney's life had been threatened, I guess the brake lines were cut; his windows were broken . . . ; he also felt that his life was jeopardized by the department." Ellis told Doshi that he felt threatened by what he was experiencing and that "[i]f I felt mistreated or if I felt cornered, I may blow somebody away." Ellis confirmed the essential details of his visit to Doshi; Ellis testified that he told Doshi that "[i]f someone was to make and be a threat to my life that I would take the appropriate amount of action to terminate the situation even if the action meant taking their life, to kill them."

Dr. Doshi concluded that Ellis was paranoid and depressed and that Ellis's "insight and judgment are grossly impaired due to delusional state." Because Dr. Doshi was concerned about the threats that Ellis had made regarding Village officials and Police Department officers, Doshi decided to examine Ellis for a second time on Saturday, March 21, 1981. After that examination, Doshi recommended to Ellis that he voluntarily admit himself to a mental hospital. Ellis refused. Dr. Doshi then advised Ellis that he felt obligated to let Ellis's potential victims know about Ellis's threats. Subsequently, Doshi telephoned Chathas to ask her to convince Ellis to enter a mental hospital. Doshi at that time told Chathas he would inform Ellis's potential victims about Ellis's threats.

Sometime that afternoon, Doshi called the Police Department because he believed there was a "serious potential for serious harm to one or more people anticipating the court date coming up for the pension decision." His call was referred to Sergeant Klomhaus. Dr. Doshi relayed

to Klomhaus what Ellis had said and told Klomhaus that although Ellis was not immediately dangerous, he did have a potential for violence. In this regard, Doshi told Klomhaus that the upcoming March 30 court date could trigger that violence. Doshi warned Klomhaus that Ellis should not possess any weapons.

Later, Klomhaus wrote a memorandum to Chief Smith describing his telephone call with Doshi. That memorandum from Sergeant Klomhaus provided in pertinent part as follows:

> The doctor is advising the police because of the potential for homicide that he feels Byron Ellis exhibits, Officer Ellis commented words to the effect that if those were all conspiring against him don't back off he's going to blow them away .... The doctor feels that Byron is in need of immediate hospitalization, and with the attorney attempted to talk to Byron into going into the hospital. Byron refused.
>
> The doctor described Byron as a time bomb who, although appears to be stable now, can go off at any time .... The doctor further feels that the next court date on his suit ... could be the critical point, especially if the decision is against Byron .... The doctor further related that in order to commit someone such as Byron a petition must be signed, and anyone can sign it. This, with two doctors' statements that a person is in need of psychiatric help, will allow a judge to sign commitment papers.
>
> The doctor advised that the reason for the call is because he feels that there is great potential for something bad to happen and he feels bound by law to report it.

Chief Smith received this memorandum setting forth Dr. Doshi's warnings on Monday morning, March 23. In addition, Chief Smith knew that Ellis had approximately fourteen guns in his home, that he made his own bullets, and that he kept gunpowder at home. Smith also knew that Ellis was a sharpshooter. Given these facts, as Lieutenant

Bergman would later testify, the Police Department wanted to avoid a confrontation with Ellis at his home, where he would have access to that arsenal.

Chief Smith called attorney Cainkar for guidance. Cainkar responded to Chief Smith on Friday afternoon. He told Chief Smith that he had spoken with Judge Eiserman, the Fifth District's presiding judge, and that Judge Eiserman had ordered additional security for the courthouse on March 30. On that Friday, Judge Eiserman had asked defendant James Ross, a Cook County deputy sheriff, to make sure that the sheriff's office provide extra security for the courthouse by setting up a desk and metal scanners at the entrance to the courthouse. In addition, Judge Eiserman ordered that everybody who entered the courthouse would be subject to a full search to ensure that no one would be armed.

Later that afternoon, Cainkar called Smith again and asked him to have Doshi fill out a certificate for Ellis' involuntary admission to a psychiatric hospital. Smith in turn instructed Klomhaus to get in touch with Doshi. Klomhaus contacted Doshi and told him that the legal department of the Village had asked him to sign a certificate for involuntary hospitalization.

The next day, Saturday, March 28, Klomhaus brought the certificate to Doshi. Doshi completed the certificate, indicating that he had examined Ellis on March 19. Dr. Doshi concluded with the following: "If patient feels under distress or if he loses control, situation could prove dangerous to others and even himself."

On Monday, March 30, Deputy Sheriff Ross arrived early at the courthouse, where he met defendant Vince Ruffalo, another deputy sheriff. Ross ordered Ruffalo to lock all the doors except the front one and to set up a desk at the front door. Ross told Ruffalo that their job was to see if any problem developed with Ellis and to report back to Judge Eiserman. Cainkar arrived next and instead informed Ross that there would be no trial. Instead, police officers would soon arrive to take Ellis to

the Tinley Park Mental Health Center for "an involuntary admission for evaluation."

Next, Chief Smith arrived along with officers Evoy and Bergman. The sheriff's deputies asked them to remove the bullets from their guns, which they did. Afterwards, the three police officers met with Cainkar and Deputies Ross and Ruffalo. Ross and Cainkar told the officers that Judge Salerno, the presiding judge, did not want Ellis in his courtroom. The group decided to stop Ellis once he entered the building and to take him into custody for this psychiatric evaluation. The police officers then stood off to the side.

After chatting with the police officers, Cainkar, armed with Dr. Doshi's certificate, went to Judge Salerno's chambers and asked him to sign papers to involuntarily commit Ellis. Judge Salerno refused.

Subsequently, at around 11:40 a.m., Chathas and Ellis arrived. Chathas walked through the initial search station set up by the sheriff's deputies. There, DiCarlo and another deputy sheriff operated a hand-held metal scanner which scanned Chathas as she walked through. According to Chathas' testimony, she told the deputies that she was going to the courtroom. DiCarlo stopped her. He and the other deputy sheriff physically lifted her off the ground, carried her twenty feet across the rotunda, deposited her inside a jury room, and shut the door. A female deputy sheriff, Angeline Chmielewski, waited in the jury room. She searched Chathas' purse and frisked her.

After walking through the metal scanning, Ellis started towards the courtroom. Smith and Evoy called out to Ellis. Ellis ignored them. Smith, Evoy and Bergman then ran towards him and grabbed him. They started pushing and jostling him. At this point, according to Ellis, Deputy Sheriff Ross screamed, "Don't let him in the courtroom." Ross then tackled Ellis around the waist and pulled him back. Someone else was punching Ellis on his lower back. Chathas testified that she opened the door to the jury room and saw Smith, Evoy, and Bergman trying to force Ellis into the jury room. When Chathas

emerged from the jury room and saw the police officers dragging Ellis across the hall, she told Smith to let go of her client. She testified that Smith responded, "Go f--- yourself." Smith, Evoy, and Bergman maneuvered Ellis across the rotunda of the courthouse into the jury room.

The police officers entered the jury room with Ellis. Sheriff's deputies were already present. Chathas testified that she advised Cainkar, who was in the room directing the others, that they were there for a trial. Cainkar allegedly replied, "I'm not doing any jury trial today. He's going . . . to Tinley Park." Cainkar advised Chathas that he was authorized to take Ellis to Tinley Park by § 3-606 of the Illinois Mental Health Code, which provides in pertinent part as follows:

> A peace officer may take a person into custody and transport him to a mental health facility when, as a result of his personal observation, the peace officer has reasonable grounds to believe that the person is subject to involuntary admission and in need of immediate hospitalization to protect such person or others from physical harm. Upon arrival at the facility, the peace officer shall complete the petition under Section 3-601.

Cainkar ordered that Ellis not be let out of the room. Evoy and Bergman closely guarded Ellis. Ellis remained in the jury room for at least thirty minutes.

Chathas testified that in addition to restraining Ellis, the police officers and deputy sheriffs also restrained her. In particular, Chathas testified that Lt. Evoy and Deputy Sheriff Ross blocked the door to the jury room. But Chathas admitted upon cross-examination that she was able to leave the jury room when she wished. In fact, she left to obtain a copy of the Illinois Revised Statutes to check Cainkar's authority to commit a person involuntarily for psychiatric evaluation. Chathas further admitted that nobody touched her after the sheriff's deputies brought her to the jury room. Chief Smith, for example, did not physically hinder her; his only sin was that, according to Chathas, "I needed to speak with my client

and he would not cooperate in permitting me some privacy to maintain the integrity of the attorney-client relationship."

Chathas walked to a law library in the courthouse and returned with a copy of the Mental Health Code. After reading § 3-606 she told Cainkar that the statute did not apply. According to Chathas, Cainkar replied that he did not care; Ellis was going to the hospital even though there was no court order forcing him to go. When Chathas warned him that he was violating Ellis' civil rights, Cainkar allegedly responded, "So what. I don't care. He's going." When Chathas repeated that he was breaking the law, Cainkar reportedly responded, "I don't give a damn about the law. He's going. Take him away." When Chathas again repeated that he was violating Ellis' civil rights, Cainkar emphatically retorted, "He has no rights; he has no rights. He's going."

Ultimately, an Alsip police officer and two paramedics from the Alsip Fire Department arrived. An Evergreen Park police officer told one of the paramedics that they would find in the jury room "an emotionally disturbed patient . . . who was known to be armed and could possibly be dangerous." Ellis was sitting peacefully on a chair in the jury room; indeed, the paramedics initially walked toward Chief Smith. The paramedics convinced Ellis to accompany them to the Tinley Park Mental Health Center. Chathas voluntarily accompanied Ellis and the paramedics.

When they arrived at Tinley Park, Donald Warmack, a Mental Health Specialist II working in the admissions department, asked the paramedics if they had any paperwork to admit Ellis. They did not. Shortly afterwards, Klomhaus and either Bergman or Evoy (there is a dispute in the record about that) arrived and presented Warmack with the certificate signed by Doshi. Warmack believed the certificate to be invalid because the certifying physician had not examined the patient within the previous 72 hours. Warmack returned the certificate. When Warmack asked the officers if they had personally observed any be-

havior upon which a petition could be based to indicate that Ellis was a danger to himself or to others, Klomhaus responded that they had not. After speaking with Ellis and Chathas, Warmack saw no reason to hold Ellis for evaluation at Tinley Park and allowed him to leave. Ellis had been at Tinley Park for approximately 45 minutes. While it is unclear when he returned to the courthouse, he ultimately won the pension litigation.

II. NATURE OF THE PROCEEDINGS

On July 13, 1981, Ellis and Chathas brought this action pursuant to 42 U.S.C. § 1983. Plaintiffs sought damages for the alleged deprivation of their Fourth, Sixth, and Fourteenth Amendment rights.[2]

Several years later, on May 5, 1987, the district court directed a verdict in favor of all defendants after plaintiffs had closed their case. The court held that defendants did not violate the plaintiffs' constitutional rights and that, in any event, defendants were entitled to qualified immunity because there was no evidence to suggest that defendants did not believe in good faith that their actions were constitutional.

Given the multiplicity of plaintiffs and defendants, we now set forth how the district court viewed the causes of action by first Chathas and then Ellis against each set of defendants with differing factual or legal issues.

Chathas v. DiCarlo: The trial court credited Chathas' testimony that DiCarlo and another deputy lifted her off her feet and either dragged or carried her to the room across the rotunda in which Chmielewski waited, but held that "[t]his would go not to a Fourth Amendment claim, but to an excessive force claim." The court then expressly relied on the standards for excessive force as set forth in *Gumz v. Morrissette*, 772 F.2d 1395 (7th Cir. 1985) to reject Chathas' claim.

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[2] Plaintiffs have since abandoned their Sixth Amendment claim.

Chathas v. Chmielewski: The court also found that Chmielewski searched Chathas. The court found, however, that Judge Eiserman's security order included pat-downs, and that pat-downs could only be done by a female officer in the privacy of another room. The court found that the fact that Chmielewski also searched Chathas' purse was also proper since the purse could not be thoroughly searched with the hand scanner and all items—according to Judge Eiserman's orders—had to be checked for weapons.

Chathas v. Ross and Ruffalo: The court found that there was no evidence that Ross or Ruffalo detained or seized Chathas in any manner. While Ross blocked the door to the jury room, Ruffalo was in the jury room at all times. Chathas admitted at trial that she was able to leave when she wanted. Thus, there could be no claims against Deputies Ruffalo or Ross.

Chathas v. the police officers: The court found that there was no evidence to suggest any interaction between Chathas and the police officers. Once Chathas was searched in the jury room, there was no evidence showing that she was in any way restrained or detained. According to Chathas' own testimony, she was free to leave the jury room when she wanted, and in fact went to retrieve the statute book.

Ellis v. Chmielewski: Ellis presented no evidence regarding Chmielewski or that he even had any contact with her.

Ellis v. DiCarlo: DiCarlo merely used the hand-held metal scanner to search Ellis, and this was done pursuant to Judge Eiserman's order.

Ellis v. Ross: Ross helped the Evergreen Park police officers subdue Ellis, but that this was within the scope of Judge Eiserman's order to maintain security. There was no evidence of excessive force (again presumably under the *Gumz* standard).

Ellis v. Ruffalo: While Ruffalo was in the same room with Ellis, there is no evidence suggesting that he did anything.

Ellis v. Cainkar: The court stated that there was a "strong argument" to be made that Cainkar had absolute immunity for his conduct in instigating the involuntary commitment proceedings, but did not reach whether Cainkar had either qualified or absolute immunity. Rather, the court relied upon the seminal case of *McKinney v. George*, 726 F.2d 1183 (7th Cir. 1984). In *McKinney*, this court held that the Fourteenth Amendment permits the police to arrest somebody and to take him to a mental hospital rather than to jail him if they have probable cause to seize him.

The district court found that probable cause to send a person to a mental hospital exists when the police have reason to believe that the person poses a danger either to himself or to others. The district court's key finding is as follows:

> Ellis has failed to present evidence that would allow a reasonable jury to conclude that Cainkar and the Evergreen Park police officials did not have probable cause to take Ellis into custody and to transport him to Tinley Park Mental Hospital for 24-hour emergency observation.

The court emphasized that the provisions of the Illinois Mental Health Code are immaterial to the constitutionality of the conduct if the police have probable cause to take someone into custody.

The court then relied upon the Fourth Amendment to explain that the lesser the intrusion upon the individual, the lower the showing that must be made to impose this intrusion. As the court held, the intrusion imposed on Ellis—transport and detention for a maximum 24-hour period—is much less than an involuntary admission which could last much longer. The court then found that "[e]ven if the Evergreen Park police were not acting with probable cause, Ellis has not presented any information which

would tend to disprove that they were objectively acting in good faith upon the belief that they had probable cause to take Ellis into custody for observation."

The court found that Judge Salerno's refusal to sign the papers shows that the judge had not observed any aberrant behavior, not that the police could not take Ellis into custody based upon Dr. Doshi's statements. The court concluded:

> Such a threatening statement conveyed to the police by Dr. Doshi is sufficient for the Evergreen Park Police Department as a matter of law to seize him and bring him in for observation. At least the Evergreen Park Police people did not know that they were violating any of Ellis' constitutional right in taking that course of action.
>
> Cainkar was acting in the good faith belief that the course of conduct he was recommending was proper under state law. Moreover, in relying on Dr. Doshi's statements and recommendation that Ellis be hospitalized, Cainkar was acting objectively reasonably.

After the plaintiffs unsuccessfully moved for a new trial, they filed timely a notice of appeal.[3]

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[3] Plaintiffs did not file a notice of appeal as to defendant Evoy. Subsequent to oral argument in this matter, on June 1, 1988, a panel of this court held the appellant's failure to name Evoy to be corrected by a letter to his counsel and that this amendment would be allowed under the All Writs Act, 28 U.S.C. § 1651. *Chathas v. Smith*, 848 F.2d 93, 94 (7th Cir. 1988). In *Torres v. Oakland Scavenger Co.*, 108 S.Ct. 2405 (1988), the Supreme Court subsequently held that naming the appellants is a jurisdictional requirement which cannot be waived even for good cause shown and that a court of appeals does not have jurisdiction over the appeal of an unnamed appellant. But the *Torres* decision only applies when a particular appellant is not named, not a particular appellee, and is based upon Fed.R.App.P. 3(c), which requires that appellants be named but does not require that appellees be specified. *See District of Columbia Nurses' Ass'n v. District of Columbia*, 854 F.2d 1448 (D.C. Cir. 1988).

III. ANALYSIS

Plaintiffs alleged that the defendants, individually or collectively in a conspiracy, deprived them of three constitutional rights: an interest in not being committed to a mental institution in violation of state law, access to the courthouse, and being free from excessive force.[4] Plaintiffs allege that the defendants did not comply with the provisions of the Illinois Mental Health Code in committing Ellis. In particular, plaintiffs assert, and presented evidence at trial to show, that the physician's certificate which the defendants presented was outdated.

If the issue were whether defendants complied with the governing state law, then we would have to reverse the district court's grant of a directed verdict. However, §1983 only provides a remedy for federal law violations. As Ellis was not actually committed, he can at most allege that the defendants, in particular the Evergreen Park police officers, seized him without probable cause in violation of the Fourth Amendment. Under this theory, however, which is the only theory available to plaintiffs, if the defendants had probable cause, this would be an absolute defense to plaintiffs' claim. *Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336, 1344 n.10 (7th Cir. 1985).

The district court found that the defendants had probable cause to take Ellis into custody and to transport him to the Tinley Park facility for 24-hour emergency observation, or at the very least had a good-faith belief that they had probable cause. The evidence that plaintiffs presented at trial can lead only to this conclusion. Probable cause arises "at [the] moment the facts and circumstances

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[4] In the pretrial order, the parties stipulated that Cainkar was the Village attorney. Under Fed.R.Civ.P. 16, what is stipulated in the pretrial order governs the future course of litigation. Thus, this court need not reach in this case whether a private individual can be liable under §1983 and, if so, what immunities he may assert.

within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91 (1964). A police officer need not personally witness the behavior giving rise to the probable cause—even if there must be personal observation according to a state statute—and can rely on another officer's direction or a reliable informant (such as Dr. Doshi). *See, e.g., Karr v. Smith*, 774 F.2d 1029, 1031-32 (10th Cir. 1985). If there is probable cause, it is irrelevant if the suspect turns out to be noncommittable. The arrest is still legal. *See Rodgers v. Lincoln Towing Service, Inc.*, 771 F.2d 194, 200 (7th Cir. 1985); *McKinney, supra*, 726 F.2d at 1187.

Where the facts are undisputed, a court may determine whether probable cause existed. *Llaguno v. Mingey*, 763 F.2d 1560, 1565 (7th Cir. 1985). There is every indication that the police reasonably believed Dr. Doshi's worries to be true. *See McKinney, supra*, 726 F.2d at 1187. Plaintiffs acknowledge in their opening brief that "[h]ad Ellis and/or Chathas walked into the courthouse brandishing guns or knives or threatening to 'blow away' the defendants, the defendants would have been justified in detaining them and in having one or both of them involuntarily admitted to a mental health hospital."

There was some evidence that Ellis could be safely confined within the courthouse. By the time the police confronted Chathas and Ellis, they already knew that Ellis was not armed and thus that he was not immediately dangerous. In addition, there was extra security at the courthouse. Yet that is not what probable cause requires. Rather, probable cause requires merely information sufficient to warrant a prudent police officer to believe that Ellis was dangerous. The evidence introduced by plaintiffs shows that Ellis had had several previous incidents in which he had used firearms when upset, including an incident in which he shot his niece and an incident in which he held the police officers at bay in his basement.

In addition, Ellis had already received or was receiving psychiatric treatment from several sources. In terms of protecting both the safety of the officers and Ellis, it makes no difference whether his latest threat to "blow away" the defendants was made in the courthouse or a week before. Probable cause arose when the officers learned of the statements Ellis made to Doshi.

In this regard, the failure of the defendants to follow the procedures set forth in §§3601 and 3606 of the Illinois Mental Health Code does not by itself deprive Ellis of any liberty interest. A state-created procedural right is not itself a liberty interest. *McKinney, supra*, 726 F.2d at 1190. The only constitutional question is whether the police had probable cause within the meaning of the Fourth Amendment and on that question a reasonable juror could only conclude that they did.

Plaintiffs next interpose a "right of access." We agree with plaintiffs that access to the courts is part of our sacred heritage. But they do not specify where in the Constitution this right of access comes from. The right of access as the Supreme Court defines it is "a right to sue and defend." *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907). Assuming the continuing validity of a substantive right of access to the courts, *see, e.g., Jackson v. Procunier*, 789 F.2d 307, 310 (5th Cir. 1986), and even assuming a delay of access may be a constitutional deprivation, here plaintiff has not alleged in any fashion that he was prejudiced by the delay. Plaintiff does not allege how long his case was delayed, and does not allege how he was prejudiced. Indeed, we question whether he was prejudiced at all, for he ultimately won all of the pension benefits he sought. Even under this most broad reading, depriving the plaintiff of ultimate access is essential for plaintiff to allege and prove, and tellingly, plaintiff has not done so here.

Finally, plaintiffs allege that the defendants used excessive force in bringing Chathas into the jury room and Ellis to Tinley Park. The district court analyzed this issue under the standard set forth in *Gumz v. Morrissette*, 772

F.2d at 1396. Under the *Gumz* test, a state officer's use of force in an arrest is unconstitutional if it (1) caused severe injuries; (2) was grossly disproportionate to the need for action under the circumstances; and (3) was inspired by malice or shocked the conscience. 772 F.2d at 1400. We agree with the district court that the evidence presented by plaintiffs does not present sufficient facts to support a claim that any of the defendants violated the *Gumz* test. They have neither proven a severe injury nor malice on the part of any of the defendants in administering the alleged excessive force. In addition, a jury could not reasonably find from either Chathas' or Ellis' testimony that the use of force was grossly disproportionate. Simply put, while Chathas and Ellis testified to the force applied, they did not testify at all to the circumstances. Chathas did not testify as to whether she was willing to go to the jury room voluntarily, and indicated that her only goal was to get into the courtroom. The officers appear merely to have directed her to the jury room. Ellis testified that he tried to run away from the officers, and thought that if he could make it into the sanctuary of the courtroom, he would be provided with a refuge from the pursuing officers. Thus, and this is a point to which we will return, the plaintiffs have not shown that the force used by the defendants was disproportionate to the circumstances. Under all three elements of the *Gumz* test, defendants did not use excessive force.

Subsequently, this court overruled *Gumz* and outlined a new standard for excessive force in arrest cases. See *Lester v. City of Chicago*, 830 F.2d 706 (7th Cir. 1987). Under *Lester*, we analyze excessive force under the Fourth Amendment, and find force to be excessive where it is unreasonable under the circumstances. The Supreme Court in *Graham v. Connor*, 109 S.Ct. 1865 (1989) recently endorsed the "objective reasonableness" standard under the Fourth Amendment, which is the same standard enunciated in *Lester*.

However, we had decided neither *Gumz* nor *Lester* at the time the defendants allegedly used excessive force

(1981). At that time, the appropriate standard for excessive force claims in this circuit was unsettled.[5] The focus of our disagreement with the dissent seems to be confined to whether the plaintiffs made a prima facie case for excessive force (Ellis) and unreasonable seizure (Chathas) based on the standards which were clearly established in 1981. While Ellis claims he was punched or pummeled, and Chathas claims she was lifted or dragged, neither claim any injury. In 1985 we decided *Gumz v. Morrissette* which required, among other things, severe injury and malice or force which shocked the conscience. What the plaintiffs describe falls far short of the *Gumz* standard. We cannot assume a more lenient standard existed before *Gumz* nor can we assume the defendants should have anticipated the objective reasonableness standard announced when *Lester v. City of Chicago* overruled *Gumz* in 1987.

Qualified immunity protects the defendants for their acts in 1981. If the hypothetical Evergreen Park officer had opened a law book in 1981, he would not have been unreasonable in concluding that conduct that did not violate the standard *Gumz* ultimately adopted would not violate the Constitution. And as the district court correctly found,

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[5] In 1982, this court held in *Blake v. Katter*, 693 F.2d 677, 682 (7th Cir. 1982), that "an allegation of excessive force during an arrest is cognizable under §1983." In *Blake*, we did not set forth any particular standard for evaluating excessive force in arrest claims but we did cite *Courtney v. Reeves*, 635 F.2d 326 (5th Cir. 1981), a case that treated excessive force in arrest as violating the Fourteenth Amendment due process clause. At the time this court decided *Gumz*, most courts analyzing excessive force claims analyzed those claims as Fourteenth Amendment violations. See *Gumz*, 772 F.2d at 1399 and the cases it cites. As we noted in *Gumz*, *id.* at 1400, three circuits had already adopted the three-part test for analyzing excessive force claims that *Gumz* ultimately adopted. Two of these cases arguably involved excessive force in an arrest; none of these cases differentiated between excessive force in arrest and other examples of excessive force. See *Wise v. Bravo*, 666 F.2d 1328, 1333 (10th Cir. 1981); *Shillingford v. Holmes*, 634 F.2d 263 (5th Cir. 1981); *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980) (cited by both *Wise* and *Shillingford*).

the defendants satisfied the *Gumz* requirements. Thus, the undisputed evidence shows that under the circumstances painted by the plaintiffs, the conduct of the defendants did "not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

We do not have to decide whether the plaintiffs made a case under the objective reasonableness standard given the state of the law when the defendants acted. Even under *Lester*, however, as noted above, plaintiffs have not shown that the defendants' actions—which they themselves describe merely as some physical contact—was unreasonable under the circumstances. As noted above, Chathas never testified that she was willing to proceed voluntarily. Ellis testified that he would not proceed voluntarily. In *Lester*, this court emphasized that not every push and shove would form the basis for a Fourth Amendment claim. We need not set forth what possible combination of circumstances would make the force the defendants used unreasonable. We hold merely that plaintiffs did not prove or offer evidence to prove those circumstances here.

Because the only allegation against Cainkar was that he conspired with the other defendants to violate the plaintiffs' constitutional rights and because the other defendants cannot be found liable, Cainkar also cannot be liable. Although the district court held that Cainkar was entitled to absolute immunity, we need not decide this issue because Cainkar, like the other defendants, either did not violate anybody's constitutional rights or was qualifiedly immune.

Finally, while plaintiffs allege that all the defendants actively conspired to deprive them of their constitutional rights, plaintiffs and the evidence they presented at trial did not support these conclusory allegations. This failure to present supporting evidence of any conspiracy means that the qualified immunity to which the defendants are entitled cannot be defeated. See *Myers v. Morris*, 810

F.2d 1437, 1453 (8th Cir. 1987); *Hollowell v. Gravett*, 703 F.Supp. 761, 764 (E.D. Ark. 1988).

Because plaintiffs have not shown that defendants violated any of their *constitutional* rights or have not overcome the qualified immunity to which defendants are entitled, we must affirm the district court's decision.

AFFIRMED.

FAIRCHILD, *Senior Circuit Judge*, concurring in part, dissenting in part.

I can agree that the information Dr. Doshi gave the Evergreen Park Police was probable cause to believe that Ellis' mental condition made him dangerous to himself or others. For the content of probable cause in this context, *see McKinney v. George*, 556 F. Supp. 645, 650 (N.D. Ill. 1983), *aff'd* 726 F.2d 1183; *Baltz v. Shelley*, 661 F. Supp. 169, 178-79 (N.D. Ill 1987). *See also*, Annotation: *Right, Without Judicial Proceeding, to Arrest and Detain One Who Is, or Is Suspected of Being, Mentally Deranged*, 92 A.L.R.2d 570 (1963 & Supps. 1983 & 1989).

Because the officers had probable cause, arrest of Ellis in order to convey him to the mental hospital for examination and possible commitment would be reasonable under the Fourth Amendment, and failure to comply with state requirements would be immaterial. *McKinney v. George*, 726 F.2d 1183, 1187-88 (7th Cir. 1984). With all respect, however, my examination of the record leads me to conclude that Ellis sufficiently made out a *prima facie* case that he was subjected to excessive force by the defendants he identified.

I can agree that the court order requiring a search for weapons justified the deputies in searching Chathas. In my opinion, however, her testimony, if believed, that DiCarlo and another deputy, after failing to respond to her request for an explanation, lifted her up by the arms

and took her to the jury room, made out a *prima facie* case of unreasonable seizure of her person in violation of the Fourth Amendment.

On the point of qualified immunity, I do not agree that plaintiffs' Fourth Amendment rights had not been clearly established.

As to the other claims asserted by plaintiffs, I agree that the District Court correctly directed a verdict.

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Teste:

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